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No. 09-09-225

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IN THE

Supreme Court of the United States

WINTHROP P. BLOCK, *ET AL.*,
Petitioners,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The case below was filed in district court in 1979. A decade later, Congress vested in the Federal Circuit exclusive jurisdiction over cases like this one. In 2009, the D.C. Circuit ordered the case dismissed for lack of subject matter jurisdiction and declined to transfer the case to the Federal Circuit.

1. Does this type of case constitute an important exception to the general rule, articulated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that new jurisdictional statutes are usually applied to pending cases?

2. If there is no exception, do the courts of appeals have inherent authority to effect transfer of such cases to courts having subject matter jurisdiction regardless of whether all the elements of 28 U.S.C. § 1631 are present?

PARTIES TO THE PROCEEDING

The following parties were plaintiffs-appellants in the D.C. Circuit and are petitioners in this Court: Winthrop P. Block, Patrick J. Burns, Brenda Iwasyk, David M. Jacobs, Tracy D. Leden, Richard Lutz, Fred A. Nachshen, and Paul S. Wollman. The underlying action was brought on behalf of the named plaintiffs and a class of those similarly situated.

Jimmie D. Shaw was named as a plaintiff-appellant in the D.C. Circuit and is deceased. Mr. Shaw's wife, Verborié W. Shaw, wishes to continue to pursue the action as Mr. Shaw's representative and thus is also named as a petitioner in this Court. If the petition is granted, a motion will be made at the appropriate time to substitute Ms. Shaw for Mr. Shaw.

William G. White was named as a plaintiff-appellant in the D.C. Circuit and is not a petitioner in this Court.

The following parties were defendants-appellees in the D.C. Circuit and are respondents in this Court: Eric K. Shinseki, Secretary of Veterans Affairs, and the Veterans Administration (now the Department of Veterans Affairs).

The following party was a defendant-appellee in the D.C. Circuit and is not a respondent in this Court: James B. Peake, M.D., former Secretary of Veterans Affairs.

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OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit granting the petition for rehearing and directing entry of an amended judgment is unpublished and reproduced in Petitioners' Appendix ("App.") at 1a. The D.C. Circuit's amended judgment and accompanying memorandum are unpublished and reproduced at App. 2a. The D.C. Circuit's original judgment and accompanying memorandum are unpublished and reproduced at App. 5a. The memorandum and order of the United States District Court for the District of Columbia are

reported at 541 F. Supp. 2d 87 (D.D.C. 2008) and are reproduced at App. 9a.

JURISDICTION

The D.C. Circuit's amended judgment upon granting of the petition for rehearing issued on May 22, 2009. This petition for certiorari is timely filed within 90 days of the D.C. Circuit's amended judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1361, 28 U.S.C. § 1651, and 5 U.S.C. § 552.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988); 38 U.S.C. § 502; and 28 U.S.C. § 1631. These statutory provisions are reproduced at App. 24a, 29a, and 30a, respectively.

STATEMENT OF THE CASE

This case presents important questions concerning the jurisdiction of the federal courts. The class action complaint in this case was filed in district court in 1979. The complaint challenged the decision of the Veterans Administration ("VA") to establish a substantive rule for adjudicating Agent Orange disability benefits claims without having first complied with the Administrative Procedure Act ("APA"). At the time the complaint was filed, the Federal Circuit did not yet exist, much less have exclusive jurisdiction over the subject matter of the district court action.

The parties filed dispositive motions soon after the action had begun. But the case languished in district

court for nearly three decades before a ruling on those motions. Around the end of the case's first decade, Congress vested exclusive jurisdiction over such cases in the Federal Circuit. Congress did not expressly prescribe, however, the effect of the jurisdiction-switching statute on pending cases. The case remained pending in district court for almost two more decades after that.

After the district court had finally decided the case on the merits, the plaintiffs appealed to the D.C. Circuit. The D.C. Circuit ultimately ordered the district court to dismiss the case for lack of subject matter jurisdiction. The first question presented by this petition concerns whether the district court had subject matter jurisdiction. The second question presented concerns whether a transfer to the Federal Circuit was available if the district court lacked subject matter jurisdiction.

The resolution of the first question and, if necessary, the second question is extraordinarily important to the class of veterans who were denied Agent Orange disability benefits on the basis of an unpublished substantive rule. The resolution of one or both of these questions also will fill an important gap in the law of federal jurisdiction, providing certainty in cases that otherwise may fall into jurisdictional limbo. Finally, if reached, the answer to the second question will resolve a split among the courts of appeals.

A. Background of the Dispute.

The complaint in this case was filed on May 31, 1979. App. 13a. It was filed on behalf of the named plaintiffs and a class of those similarly situated. The proposed class definition ultimately was refined to

include: "all current and former members of the United States armed forces (or their survivors) who applied for disability and death compensation benefits with the Veterans Administration (now named the Department of Veterans Affairs) based on Agent Orange exposure and had their claims denied between April 17, 1978 and September 25, 1985." The named plaintiffs who are petitioners in this Court include some of the original named plaintiffs and named plaintiffs who were later added to the case.

The VA and then-Administrator of Veterans Affairs were named as defendants. The complaint challenged the VA's use of a document known as the Agent Orange Program Guide to decide Agent Orange claims without having subjected those rules to public notice and comment rulemaking and publication. The portion of the Agent Orange Program Guide most pertinent to this dispute stated: "Except for a skin condition known as chloracne, there are presently no firm data to incriminate the herbicides as causative agents of any other known category of disease or chronic symptom." App. 11a.

The plaintiffs alleged violations of the APA, 5 U.S.C. § 553, the VA's own regulations requiring compliance with the notice and comment provisions of the APA, 38 C.F.R. § 1.12 (1984), and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. App. 9a. The district court had jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1361, 28 U.S.C. § 1651, and 5 U.S.C. § 552.

The plaintiffs principally sought two forms of relief. First, they asked that the unpublished rules (in the form of the Agent Orange Program Guide) be voided and that the VA be ordered to conduct public notice

and comment rulemaking under the APA to establish the standards for deciding Agent Orange claims. Congress had authorized the VA to issue such rules regarding "the nature and extent of proofs and evidence . . . in order to establish the right to benefits." 38 U.S.C. § 210(c)(1) (1982) (later replaced by 38 U.S.C. § 501). Second, the plaintiffs asked that the individual claim denials under the unpublished rules be voided, with notice to the class of their right to have their claims adjudicated under the new rules to be published. App. 14a.

In 1984, Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act (the Dioxin Act), 38 U.S.C. § 354 (1990). The Dioxin Act required, among other things, that the VA conduct a public rulemaking proceeding to adopt published rules governing Agent Orange compensation claims. *Id.* Responding to Congress's mandate, the VA conducted a public rulemaking proceeding. On August 26, 1985, the VA published final rules for adjudicating Agent Orange claims. App. 12a.

The rules became effective on September 25, 1985. App. 12a. The publication of these rules mooted the first principal form of relief that the plaintiffs sought—ordering the VA to engage in public notice and comment rulemaking. It did not, however, moot the second principal form of relief that the plaintiffs sought—the voiding of individual claim denials under the unpublished rules so that those claims could be adjudicated under the new, published rules. This second form of relief was the subject of the merits decision ultimately rendered by the district court in this case. App. 14a.

The VA's published rules were later voided. *See Nehmer v. United States Veterans' Administration*,

712 F. Supp. 1404, 1423 (N.D. Cal. 1989). A subsequent consent order provided for automatic readjudication of claims denied on or after September 25, 1985, App. 13a, and successful claims were made effective as of the date the claim was originally filed. But the VA was not required to automatically readjudicate claims that were denied before September 25, 1985—*i.e.*, claims denied while the Agent Orange Program Guide was in effect. Those who had such claims denied could file a new application for benefits, but a successful claim would not be effective as of the date the original claim was filed. Because this gap has persisted, this case has remained a live controversy.

B. Procedural History of District Court Case.

Soon after the case began, the parties filed three motions that eventually gave rise to the district court's judgment. First, in August 1979, the plaintiffs filed a motion for class certification. Second, in December 1979, the plaintiffs filed a motion for summary judgment. Third, also in December 1979, the defendants filed a motion for judgment on the pleadings. Oral argument on the motions was heard in February 1980. The parties submitted additional briefs and supplemental filings over the next few years. The case thereafter was marked by alternating periods of inactivity and additional filings until the district court ruled on the original motions in March 2008. App. 13a-14a.

The district court ruled in favor of the defendants on the merits. The district court framed the issue as whether the Agent Orange Program Guide's "Except for . . . chloracne" pronouncement was a substantive rule or a general statement of policy. App. 16a. The

district court then ruled that the pronouncement was a general statement of policy and not a substantive rule. App. 17a-22a. As a result, the district court granted the defendants' motion for judgment on the pleadings and denied the plaintiffs' motions for class certification and summary judgment. App. 22a-23a. The district court did not specifically address the requirements for class certification found in Rule 23 of the Federal Rules of Civil Procedure. App. 9a-23a. The district court simply denied this motion summarily along with its disposition of the other pending motions. App. 22a-23a. The plaintiffs appealed to the D.C. Circuit. App. 5a. The D.C. Circuit had jurisdiction under 28 U.S.C. § 1291.

C. Intervening Jurisdictional Developments.

In 1988, while the case was pending in the district court, Congress passed the Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988). Sections 101 and 102 of the VJRA are codified as amended at 38 U.S.C. §§ 511 and 502, respectively. The relevant portions of § 511 and § 502 were initially codified at 38 U.S.C. § 211 and § 223, respectively. They were renumbered with the enactment of the Department of Veterans Affairs Codification Act, Pub. L. 102-83, 105 Stat. 378 (1991). For the sake of convenience, the portion of VJRA § 102 vesting exclusive jurisdiction in the United States Court of Appeals for the Federal Circuit will be referred to as "§ 502" in this petition.

In relevant part, § 502 states:

> An action of the Administrator to which section 552(a)(1) or 553 of title 5 (or both) refers . . . is subject to judicial review. Such review shall be

> in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provision of chapter 72 of this title [providing for review of decisions of the newly-created United States Court of Veterans Appeals], the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

The VJRA thus provides two fora in which to seek judicial review of the publication and rulemaking procedures of the VA—the Federal Circuit and the United States Court of Veterans Appeals (now the United States Court of Appeals for Veterans Claims ("CAVC")), with the Federal Circuit authorized to review a CAVC decision under VJRA § 301 (codified in relevant part as amended at 38 U.S.C. § 7292). The effective date provisions of the VJRA indicate that judicial review in either forum may be "sought" under the VJRA only for cases filed after the act became effective. *Cf. Nehmer*, 712 F. Supp. at 1410-11 ("The Act amends section 211(a) to explicitly authorize judicial review in the Federal Circuit Court for all statutory challenges to VA rulemaking filed after September 1, 1989."). The VJRA was passed on November 18, 1988. Chapter 72 of the VJRA (which created the CAVC and its procedures) and the judicial review provisions of § 502 took effect on September 1, 1989. *See* VJRA § 401.

Congress did not include any express provision concerning the application of § 502 to cases pending in district court. The legislative history, however, suggests that Congress intended not to disturb these

cases. *See, e.g.*, 134 Cong. Rec. S16631-01, S16637 (daily ed. Oct. 18, 1988) (remarks of Senator Mitchell) ("[W]hile review of VA regulations will eventually be available in the Federal Circuit, pending suits in district courts will remain there, unless both parties agree to take them to the Federal Circuit."); *id.* at S16650 (remarks of Senator Cranston) ("[N]o pending case would be adversely affected by the compromise agreement.").

D. The D.C. Circuit Decisions.

The D.C. Circuit did not reach the merits of the appeal from the district court's decision. Instead, the D.C. Circuit ruled that the district court did not have subject matter jurisdiction over the case. App. 5a-8a. The D.C. Circuit held that this case was governed by the rule that "[u]nder normal circumstances, application of a new jurisdictional statute "'takes away no substantive right, but simply changes the tribunal that is to hear the case.'" App. 7a-8a (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916))). The court held that, despite the risk that dismissal on jurisdictional grounds might time-bar the underlying claims, § 502 did not have a "'retroactive effect'" within the meaning of *Landgraf*. App. 8a (quoting *Landgraf*, 511 U.S. at 269-70). The court also noted parenthetically that, in light of the decade-long delay between the filing of the complaint and the passage of the VJRA, the plaintiffs are likely to have "a strong argument for equitable tolling of the statute [of limitations]." App. 8a.

To fully resolve the concern about the statute of limitations, the D.C. Circuit did not order the district court to dismiss the case for lack of subject matter jurisdiction. App. 8a. Rather, the D.C. Circuit vacated

the underlying decision and remanded the case with instructions to transfer the case to the Federal Circuit under 28 U.S.C. § 1631. App. 5a-6a, 8a. As the D.C. Circuit put it: "We lack jurisdiction, but in light of the *Bleak House*-like history of this case—which now spans six presidential administrations—we now apply our authority under 28 U.S.C. § 1631 to transfer this matter to the Federal Circuit 'in the interest of justice.'" App. 7a.

The defendants then filed a petition for rehearing. They argued that the D.C. Circuit lacked authority to transfer the case to the Federal Circuit under 28 U.S.C. § 1631 because the action could not have been filed in the Federal Circuit at the time it was filed in the district court. The defendants' argument was predicated on the fact that jurisdiction over such cases was not vested in the Federal Circuit until approximately a decade after this action had been filed in district court. In response, the plaintiffs argued that the D.C. Circuit had both statutory and inherent authority to effect transfer of the case.

The D.C. Circuit granted the petition for rehearing and entered an amended judgment. App. 1a-4a. The court's *Landgraf* analysis and ruling that the district court lacked subject matter jurisdiction remained unchanged. App. 3a-4a. But this time, rather than order transfer of the case to the Federal Circuit, the D.C. Circuit vacated the underlying decision and ordered the district court to dismiss the case for lack of subject matter jurisdiction. App. 2a-3a. The D.C. Circuit did not expressly address the question of its authority to effect transfer of the case. Instead, reversing course from its earlier ruling, the court simply did not order the case transferred. App. 1a-4a.

REASONS FOR GRANTING THE PETITION

The plaintiffs in this case timely and properly filed their action in a court having subject matter jurisdiction. Congress vested in the Federal Circuit exclusive jurisdiction over such cases approximately ten years later. Unless given the benefit of equitable tolling, the six-year statute of limitations on the plaintiffs' claims, *see* 28 U.S.C. § 2401, would have expired if they were forced to re-file those claims in the Federal Circuit. Applying the new jurisdictional statute to pending cases, without transferring such cases to the court now vested with jurisdiction, thus would risk the time-barring of properly-filed claims without any indication that Congress intended that result.

This Court should grant review not simply to avert injustice to the class of plaintiffs affected by the ground-breaking jurisdictional ruling in this case. Rather, review is also needed to equip the lower federal courts to properly address such "jurisdictional limbo" scenarios and establish clear default rules against which Congress may enact jurisdiction-switching statutes in the future.

I. THIS COURT SHOULD RESOLVE THE IMPORTANT QUESTION WHETHER A JURISDICTION-SWITCHING STATUTE IS PRESUMPTIVELY APPLIED TO PENDING CASES WHERE ITS APPLICATION RISKS EXTINGUISHING CLAIMS ALTOGETHER.

Whether § 502 applies to actions pending prior to its effective date is governed by this Court's analytical framework set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and its progeny. The

first step is "to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If Congress has done so, the inquiry ends and Congress's prescription must be followed. *Id.* This first step of the *Landgraf* analysis includes application of the "normal rules of [statutory] construction." *Lindh v. Murphy*, 521 U.S. 320, 325-26 (1997). The rules of statutory construction "may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case)." *Id.* at 326.

Where Congress has not provided an express command, courts must "determine whether the new statute would have retroactive effect." *Landgraf*, 511 U.S. at 280. A newly-enacted statute has a retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Id.* at 269-270. If a new statute would operate retroactively, courts are to apply a presumption against the application of the statute unless Congress has expressed a clear intent to the contrary. *Id.* at 280.

The Court in *Landgraf* observed: "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274. The Court explained: "Application of a new jurisdictional rule *usually* 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)) (emphasis added). But the Court made an important qualification of this general rule:

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of

> complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case.

Id. at 275 n.29. As a result, even when confronted with a statute that appears purely "jurisdictional," courts must conduct a full *Landgraf* analysis to determine whether application of the statute to pending cases would take away a substantive right rather than simply alter the tribunal.

Following this nuanced approach, a number of courts of appeals have declined to apply to pending cases statutes with a jurisdictional veneer where such application would extinguish existing claims. *See, e.g., Hartford Cas. Ins. Co. v. FDIC*, 21 F.3d 696, 702 (5th Cir. 1994) (declining to apply shortened statute of limitations to pending case because it "would extinguish claims which were valid before the statute's effective date and deprive [the plaintiff] of a forum, even though it acted properly under law existing at the time its claims arose"); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 163-64 (3d Cir. 1998) (declining to apply to pending case statute "phrased in federal jurisdictional terms" because, under the statute, "no tribunal retains the authority to hear a RICO case predicated on securities fraud").

Here, the D.C. Circuit's decision goes in the opposite direction. While recognizing the risk that the plaintiffs' claims might be time-barred, the court applied § 502 to the pending action because it was a

"jurisdictional" statute. But § 502 did not simply create jurisdiction where none existed. Nor did it oust the jurisdiction of all courts over a type of action. Rather, § 502 vested in the Federal Circuit exclusive jurisdiction over a type of action that previously could be brought in district court. Because of the potential time-barring problem, application of § 502 to this case threatens to deprive the plaintiffs of a substantive right to have their benefits claims adjudicated under a lawful regulatory scheme. Because Congress did not clearly indicate any contrary intent, the presumption against retroactivity dictates that § 502 should not be applied to this case.

This case presents a ripe opportunity to clarify an important exception to *Landgraf*'s general rule concerning the application of jurisdictional statutes to pending cases. Resolution of the first question presented also will resolve the tension between the D.C. Circuit's decision and the decisions of other courts of appeals in analogous cases. Further, this Court's decision will establish an important default rule against which Congress may legislate in enacting jurisdiction-switching (as opposed to purely jurisdiction-conferring or jurisdiction-ousting) statutes in the future.

II. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS ON THE IMPORTANT QUESTION WHETHER THE COURTS OF APPEALS HAVE INHERENT AUTHORITY TO TRANSFER CASES.

If the district court lacked subject matter jurisdiction, then this case presents another important question, one on which the courts of appeals are divided. This question is whether the courts of appeals have

inherent authority to effect transfer of cases over which they lack subject matter jurisdiction to federal courts that have subject matter jurisdiction.

Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631.

Before the enactment of § 1631, the courts of appeals split on the question whether a court of appeals that lacked subject matter jurisdiction over a case had inherent authority to transfer the case to a court of appeals having jurisdiction and venue. On one side, the Ninth Circuit held that "we have power to transfer a pending case to another circuit even when the latter circuit has exclusive jurisdiction and venue to review the order in question." *See Pearce v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 603 F.2d 763, 771 (9th Cir. 1979). On the other side, the First Circuit and Third Circuit held that the courts of appeals did not have this transfer power when the transferor court lacked subject matter jurisdiction. *See Dantes v. Western*

Foundation Corporation Ass'n, 614 F.2d 299, 301 & n.2 (1st Cir. 1980); *Atlantic Ship Rigging Co. v. McLellan*, 288 F.2d 589, 590-91 (3d Cir. 1961); *see generally Dornbusch v. Commissioner*, 860 F.2d 611, 613 (5th Cir. 1988) (discussing this circuit split).

After the enactment of § 1631, many transfers could be effected under the new statutory mandate. But because the language of the statute, read literally, mandated transfer only where, *inter alia*, there is a "court in which the action or appeal could have been brought at the time it was filed or noticed," 28 U.S.C. § 1631, the question of inherent authority remained relevant. For example, if § 1631 were construed (as it apparently was here) to prohibit transfer from a court that originally had jurisdiction to a court that now has jurisdiction but lacked jurisdiction when the action was originally filed, then a court's inherent transfer authority could fill this gap.

The D.C. Circuit's decision in this case conflicts at least with the Ninth Circuit's decision in *Pearce* recognizing the inherent transfer authority of the courts of appeals. While the D.C. Circuit did not expressly address the issue, its ultimate decision necessarily rests on the premise that it lacked inherent authority. In its initial decision, the D.C. Circuit ruled that it lacked subject matter jurisdiction but ordered transfer of the case to the Federal Circuit under § 1631 "in the interest of justice." In their rehearing petition, the defendants argued only that transfer authority was lacking under § 1631 because the Federal Circuit did not have jurisdiction at the time the district court action was filed. The defendants did not argue that transfer otherwise would not be "in the interest of justice." In their response, the plaintiffs argued that the D.C. Circuit had both

statutory and inherent authority to effect transfer of the case. The D.C. Circuit's decision to reverse course and decline to transfer the case can mean only that it considered both statutory and inherent authority to be lacking.

The enactment of § 1631 did not moot the question of inherent authority. Nothing in the language or purpose of § 1631 indicates that Congress intended to deprive any court of appeals of its inherent discretionary authority to transfer cases over which it lacks jurisdiction. Congress did not make § 1631 the exclusive auspice under which transfer of such cases may be effected. Rather, § 1631 is a mandatory statute requiring that courts "shall" transfer certain actions or appeals as provided in the statute "if it is in the interest of justice." This command is consistent with the retention of inherent discretionary authority to transfer cases where the requirements of § 1631 are not met.

Moreover, the purpose of § 1631 is to "eliminate any prejudice that results from filing in an improper forum." *Dalton v. Southwest Marine, Inc.*, 120 F.3d 1249, 1250 (Fed. Cir. 1997). The need to avoid such prejudice is even more compelling when a plaintiff files in a then-proper forum, but a jurisdiction-switching statute subsequently vests exclusive jurisdiction in another forum, and the new statute is applied to pending cases. Because Congress did not expressly address the latter situation in § 1631, resolution of the question whether the courts of appeals possess inherent authority to effect transfer is critical to preventing—both here and in future cases—the kind of inequitable result that may result from the dismissal in this case. This Court should

resolve this important question of federal jurisdiction on which the courts of appeals are divided.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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August 20, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: May 22, 2009]

No. 08-5161
September Term 2008
1:79-cv-01426

WILLIAM G. WHITE, *et al.*,
Appellants,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION,
Appellees.

BEFORE: Brown and Griffith, Circuit Judges, and Silberman, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing and the response thereto, it is

ORDERED that the petition be granted. The Clerk is directed to issue an amended judgment in lieu of the judgment issued April 7, 2009. The Clerk is further directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

/s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: May 22, 2009]

No. 08-5161
September Term, 2008

WILLIAM G. WHITE, *et al.*,
Appellants,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION,
Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:79-cv-01426)

BEFORE: BROWN and GRIFFITH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*

AMENDED JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. It is

ORDERED AND ADJUDGED that the district court order filed March 28, 2008, be vacated, and the case be remanded to the district court with instructions to dismiss for the reasons stated in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

/s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

MEMORANDUM

We lack jurisdiction and therefore grant the government's petition for rehearing. The opinion below is vacated, and the case is remanded to the district court with instructions to dismiss.

The Veterans' Judicial Review Act provides that the "decision of the Secretary as to any [question of law or fact affecting the provision of benefits to veterans] shall be final and conclusive and may not be reviewed . . . by any court," except for such matters as are subject to § 502 of the Act. 38 U. S.C. § 511(a), (b). Section 502 vests exclusive jurisdiction for review of claims relating to FOIA publication requirements and APA notice and comment rulemaking in the Federal Circuit.[1]

In *LaFontant v. INS*, 135 F.3d 158, 161-65 (D.C. Cir. 1998), we considered whether the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C.A. § 1105a, which stripped the jurisdiction of circuit courts to review certain deportation orders, could be

[1] Alternatively, the Act vests jurisdiction in the Court of Appeals for Veterans Claims, which was newly created at the time of the Act's passage in 1989 and thus unavailable to Appellants, who filed with the district court in 1979.

applied to cases pending at the time of the statute's enactment. Relying on a host of Supreme Court precedent, we held that "in order to determine whether a statute applies to a case that was filed prior to passage of the statute, courts must determine whether the statute is 'procedural' in nature, or whether it affects 'substantive entitlement to relief.'" 135 F.3d at 163 (*quoting Lindh v. Murphy*, 521 U.S. 320, 327 (1997)). Under normal circumstances, application of a new jurisdictional statute "'takes away no substantive right, but simply changes the tribunal that is to hear the case.'" *Landgraf v. USI Film Prods.*, 511 U. S. 244, 274 (1994) (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

Such is the case here. Given this overwhelming body of binding precedent, the isolated and ambiguous legislative history cannot be controlling. *See, e.g., Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 599 (2004). A statute has a "retroactive effect" when it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U. S. at 269-70. Appellants have some argument that dismissal of their case on jurisdictional grounds may risk the time-barring of their claim via the independent operation of the applicable statute of limitations, but the language of the Act did nothing to alter the limitations period.[2]

---

[2] We note that Appellants are likely to have a strong argument for equitable tolling of the statute should they choose to re-file in the Federal Circuit, particularly in light of the decade-long delay between the filing of their petition with the district court in 1979 and the passage of the Act in 1989, during which period the case lay dormant, apparently through no fault of Appellants. This argument, however, must be made to the Federal Circuit, not to us.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed: April 7, 2009]

No. 08-5161
September Term, 2008

WILLIAM G. WHITE, *et al.*,
Appellants,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION,
Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:79-cv-01426)

BEFORE: BROWN AND GRIFFITH, *CIRCUIT JUDGE*, AND SILBERMAN, *SENIOR CIRCUIT JUDGE*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. It is

ORDERED AND ADJUDGED that the district court order filed March 28, 2008, be vacated, and the case be remanded to the district court with instructions to transfer the case in the "interest of justice" under 28 U.S.C. § 1631, to the United States Court of

Appeals for the Federal Circuit, for the reasons stated in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

/s/ Scott H. Atchue
Scott H. Clerk
Deputy Clerk

MEMORANDUM

We lack jurisdiction, but in light of the *Bleak House*-like history of this case—which now spans six presidential administrations—we now apply our authority under 28 U.S.C. § 1631 to transfer this matter to the Federal Circuit "in the interest of justice."

The Veterans' Judicial Review Act provides that the "decision of the Secretary as to any [question of law or fact affecting the provision of benefits to veterans] shall be final and conclusive and may not be reviewed . . . by any court," except for such matters as are subject to § 502 of the Act. 38 U.S.C. § 511(a), (b). Section 502 vests exclusive jurisdiction for review of claims relating to FOIA publication requirements and APA notice and comment rulemaking in the Federal Circuit.[1]

In *LaFontant v. INS*, 135 F.3d 158, 161-65 (D.C. Cir. 1998), we considered whether the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C.A. § 1105a, which stripped the jurisdiction of circuit courts to review certain deportation orders, could be applied to cases pending at the time of the statute's enactment. Relying on a host of Supreme Court precedent, we held that "in order to determine whether a statute applies to a case that was filed prior to passage of the statute, courts must determine whether the statute is 'procedural' in nature, or whether it affects 'substantive entitlement to relief.'" 135 F.3d at 163 (*quoting Lindh v. Murphy*, 521 U.S. 320, 327 (1997)). Under normal circumstances, appli-

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[1] Alternatively, the Act vests jurisdiction in the Court of Appeals for Veterans Claims, which was newly created at the time of the Act's passage in 1989 and thus unavailable to Appellants, who filed with the district court in 1979.

cation of a new jurisdictional statute "'takes away no substantive right, but simply changes the tribunal that is to hear the case.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

Such is the case here. Given this overwhelming body of binding precedent, the isolated and ambiguous legislative history cannot be controlling. *See, e.g., Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 599 (2004). A statute has a "retroactive effect" when it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-70. Appellants have some argument that dismissal of their case on jurisdictional grounds may risk the time-barring of their claim via the independent operation of the applicable statute of limitations, but the language of the Act did nothing to alter the limitations period. (We note that the Appellants are likely to have a strong argument for equitable tolling of the statute, particularly in light of the decade-long delay between the filing of their petition with the district court in 1979 and the passage of the Act in 1989, which delay appears not to have been their fault.)

We therefore vacate and remand to the district court with instructions to transfer the case to the Federal Circuit under 28 U.S.C. § 1631, which should resolve any time-bar concerns. The Federal Circuit has the accumulated expertise of twenty-one years in dealing with claims such as Appellants'. While it may be that the Federal Circuit will *also* deny that it has jurisdiction over this case, *see Brown v. Sec'y of Veterans Affairs*, No. 95- 7067, 1997 WL 488930 (Fed. Cir. Aug. 22, 1997), it is the only place where jurisdiction is conceivable.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 79-1426 (JR)

WILLIAM WHITE, *et al.*,
Plaintiffs,

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS,
Defendant.

March 28, 2008

MEMORANDUM

JAMES ROBERTSON, District Judge.

This case, pending in this Court since 1979, concerns an Agent Orange Program Guide that was issued by the Veteran's Administration in 1978 and remained in effect until 1985. Plaintiffs' contention is that the VA adopted the AOPG in violation of the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553, and the publication requirement of the Freedom of Information Act, 5 U.S.C. § 552(a)(1). Because I have concluded that the AOPG did not announce a binding, substantive rule, summary judgment will be granted to the defendant.

Background

A. Regulatory Framework

Although the statutory and regulatory framework has changed over the nearly three decades in which this suit has been pending, the basic entitlement of veterans to benefits for service-connected disabilities has not. The VA regulation setting out "principles relating to service connection" is found at 38 C.F.R. § 3.303 and has been in effect without substantive change since 1961. Section 3.303(a) provides that service connection can be established in two ways, 1) through "the application of statutory presumptions", or 2) by "affirmatively showing inception or aggravation [of a disease or injury] during service[.]" The first route is known as presumptive service connection and the second as direct service connection. At the time this suit was filed, disabilities stemming from a defined and limited number of conditions, including leukemia, Hodgkin's disease, and malignant tumors, were presumptively service connected if diagnosed within a year after active service. 38 U.S.C. § 312 (1979) (amended by P.L. 102-83, § 5(a), 105 Stat. 406 (1991), and transferred to 38 U.S.C. § 1112). For enumerated diseases diagnosed more than a year after the end of active service, and for all other diseases that were not the subject of a statutory presumption, Section 3.303(d) provided that "[s]ervice connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service." *See also* 38 C.F.R. § 3.304 (listing direct service connection requirements). Reasonable doubt was resolved in favor of the veteran, but, under regulations that were in effect during the same period as the AOPG, "the claimant [was] required to

submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded." 38 C.F.R. § 3.102 (1984).

B. History of Agent Orange Compensation

The Agent Orange Program Guide, in effect from April 17, 1978, until September 25, 1985, was issued by the VA, without public notice or comment, as a one-page amendment to the VA's Compensation and Pension Program Guide (PG 21-1), a resource designed for use by agency adjudicators. [Dkt. 33]. The forward to PG 21-1, written in 1963, states: "It should be understood that program guides are non-directive and non-policymaking. They are obviously superseded by instructions, technical bulletins, regulations, or other authoritative issues at variance[ ] on the same subject matter." [Dkt. 26, Ex. 1]. The relevant portion of the AOPG, titled "Rating Practices and Procedures-Disability-Vietnam Defoliant Exposure," states:

> Claims for service-connected disability benefits are being received from veterans who claim disability incurred through or aggravated by exposure to defoliants used during the Vietnam War.
>
> Except for a skin condition known as chloracne, there are presently no firm data to incriminate the herbicides as causative agents of any other known category of disease or chronic symptom. However, a contaminant Dioxin, found in small quantities in defoliants is toxic.
>
> No special procedures will be initiated for these claims. Instead, each case will receive a thorough development of all available evidence. This will include a request to both the veteran and the service department to furnish verification of

> exposure to herbicides, the extent and durations thereof and the dates on which such exposure occurred.
>
> All other required development will be done concurrently with the request for verification of exposure to defoliants, and each case will be extended the same consideration given any other claim for service connection.

[Dkt. 23, Ex. A]. These provisions for "rating practices and procedures," in plaintiffs' submission, amounted to the announcement of a rule that required VA adjudicators to deny Agent Orange claims for diseases other than chloracne. Their argument focuses on a single sentence-"Except for a skin condition known as chloracne, there are presently no firm data to incriminate the herbicides as causative agents of any other known category of disease or chronic symptom"-and on the fact that, while the AOPG was in effect, agency adjudicators denied every single Agent Orange-related claim that was for a disease or condition other than chloracne. [Dkt. 27 at 6].

Plaintiffs' suit had been pending here for nearly five years when Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. No. 98-542, 98 Stat. 2725 (Oct. 24, 1984) ("Dioxin Act"). That statute required the VA to create an advisory committee of scientists, and, after receiving the committee's advice, to promulgate regulations based on "sound scientific and medical evidence" identifying diseases that should be deemed presumptively service connected. 38 U.S.C. § 354 (3)(1984). Pursuant to the Dioxin Act, on August 26, 1985, the VA promulgated a final regulation that went into effect in September 1985.

34,452, 34,458 (Aug. 26, 1985) (codified at 38 C.F.R. § 3.311a (1985)). In that regulation, the VA authorized presumptive service connection only for chloracne. *See Williams v. Principi,* 15 Vet. App. 189, 192 (2001) (discussing history of Agent Orange compensation). In 1989, the U.S. District Court for the Northern District of California invalidated the regulation, holding the VA had acted contrary to the Dioxin Act in requiring more evidence than statistical correlation to establish the causal relationship needed for a disease to be the subject of presumptive service connection. *Nehmer v. U.S. Veterans Admin.,* 712 F.Supp. 1404, 1418 (N.D. Cal. 1989). The *Nehmer* litigation, brought as a class action, required the VA to conduct a new rulemaking and voided all denials issued from 1985 until 1989 that had been based on the invalidated regulation.

In 1991, Congress disbanded the VA's internal scientific advisory committee and instead required the VA to work with the National Academy of Sciences in promulgating new Agent Orange regulations. *See* 38 U.S.C. § 1116(b). Since then, the VA has issued many liberalizing regulations that presumptively service connect numerous diseases to Agent Orange exposure. *See* 38 C.F.R. § 3.309(e).

C. Procedural History

The complaint in this case was filed on May 31, 1979. On August 31, 1979, the plaintiffs filed a motion for class certification, and, on December 3, 1979, they filed a motion for summary judgment. Later that month, on December 28, the government moved for judgment on the pleadings. Oral argument was heard in February 1980. In 1984, following passage of the Dioxin Act, the government filed a motion

to dismiss the case as moot. All four motions remain unresolved. The case was reassigned to me on October 25, 2007.

The parties have long acknowledged that the withdrawal of the AOPG in 1985 mooted plaintiffs' primary request that the Court order the VA to conduct a public rulemaking on Agent Orange-related disability. Based on their contention that the AOPG was issued in violation of FOIA's publication requirement and the APA's notice and comment provisions, plaintiffs still seek class certification and an order voiding Agent Orange denials issued by the VA from April 1978 until September 1985.

In the numerous rounds of supplemental briefing that have taken place, the government has submitted and relied on materials outside of the pleadings, including decisions of the Board of Veterans Appeals and a number of declarations. The government's Rule 12(c) motion for judgment on the pleadings is accordingly treated as a motion for summary judgment.[1] *See* Fed. R. Civ. P. 12(d); *Yates v. District of Columbia*, 324 F.3d 724, 725 (D.C. Cir. 2003).

Analysis

A. Requirements for Notice and Comment Rulemaking

"Under 5 U.S.C. § 553, an agency seeking to promulgate a rule must first provide the public with

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[1] Rule 12(d) may be read as requiring advance notice of a court's intention to treat a motion filed under Rule 12(c) as a motion under Rule 56. The "instant" motion was filed 28 years ago, however, and I find that the parties have been given "reasonable opportunity to present all the material that is pertinent to the motion."

notice of, and an opportunity to comment upon, a proposed version of it." *Chamber of Commerce v. U.S. Dept. of Labor,* 174 F.3d 206, 211 (D.C. Cir. 1999). Such rules must be published in the federal register pursuant to the Freedom of Information Act. 5 U.S.C. § 552(a)(1). Notice and comment rulemaking is not required for "rules of agency . . . procedure" and "general statements of policy." 5 U.S.C. § 553(b)(3)(A).[2]

The government's position is that the AOPG "was not a substantive rule subject to the rulemaking requirements of the APA." [Dkt. 33 at 1]. It maintains that the AOPG, including what the plaintiffs' characterize as its "nothing-but-chloracne" statement, was "informational, designed to inform agency employees of the existing state of factual knowledge and, to a lesser extent, the state of the law." [Dkt. 22 at 24]. All the Program Guide did, according to the government, was "advise[ ] the agency adjudicative personnel that, except for chloracne, the state of medical knowledge does not permit a general assumption that exposure to herbicides may result in disabilities many years later." *Id.* at 25.

In much of their briefing, the plaintiffs characterize the defendants' position as arguing that the Program Guide "amounts to a procedural rule." [Dkt. 52 at n. 2]. Framing the issue in that way has some interest

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[2] Policy statements "must either be published in the federal register or made available for public inspection and copying." *Building Indus. Ass'n v. Babbitt,* 979 F. Supp. 893, 904-05 (D.D.C. 1997) (citing 5 U.S.C. §§ 552(a)(1)(D) and (a)(2)(B)). The AOPG was indexed and made available for public inspection and copying. [Dkt. 40, Ex. 4]. It was also distributed to all congressionally-chartered and VA-recognized veterans' service organizations. [Dkt. 16, Ex. 1].

value,[3] but it assumes the answer to the real question presented here, which is whether the Program Guide is, or contains, a rule at all. (If it is a rule, or contains one, there is nothing procedural about it. *See Batterton*, 648 F.2d at 707 (explaining that procedural rules deal with the manner in which agencies "organiz[e] their internal operations").)

The AOPG's pronouncement on chloracne was either a substantive rule or a general statement of policy. "The primary distinction between a substantive rule-really any rule-and a general statement of policy [ ] turns on whether an agency intends to bind itself to a particular legal position." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 97 (D.C. Cir. 1997). The Court of Appeals has elaborated on the distinction as follows:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent proceedings . . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . .
>
> A general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to

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[3] "Substantive rules are ones which grant rights, impose obligations, or produce other significant effects on private interests." *American Hospital Assoc. v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). A procedural rule "does not itself 'alter the rights or interest of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'" *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)).

> which it is addressed . . . . A policy statement announces the agency's tentative intentions for the future.

Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). So long as an agency pronouncement "leaves the administrator free to exercise his informed discretion," it will not be "deemed a binding regulation merely because it may have some substantive impact[.]" *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.,* 822 F.2d 1105, 1110 (D.C. Cir. 1987) (internal citation and quotation marks omitted).

There is no simple "axiom to distinguish between regulations and general statements of policy." *Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 536-37 (D.C. Cir. 1986). At the outset, courts are to give "some, albeit 'not overwhelming,' deference to an agency's characterization of its statement." *Cmty. Nutrition Inst. v. Young,* 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting *Brock,* 796 F.2d at 537).

Far more important, however, is "the language actually used by the agency." *Id.*

B. Did the AOPG Establish a Substantive Rule?

Neither the language nor the context of the AOPG suggests that it was intended to establish a binding rule of decision. The sentence that plaintiffs rely upon contains no directive language indicative of a binding norm. It is tentative and self-qualifying: that there are "*presently* no *firm* data" does not bind agency adjudicators to take a particular position in each case before them, but instead allows for evolution in the state of medical understanding on Agent Orange and disease causation. The next sentence

seems to anticipate such developments: "However, a contaminant Dioxin, found in small quantities in defoliants is toxic." The paragraphs that follow make clear that, on its face, the text of the rule did not change the substantive framework for demonstrating service connection:

> No special procedures will be initiated for these claims. Instead, each case will receive a thorough development of all available evidence. This will include a request to both the veteran and the service department to furnish verification of exposure to herbicides, the extent and duration thereof and the dates on which such exposure occurred.
>
> All other required development will be done concurrently with the request for verification of exposure to defoliants, and each case will be extended the same consideration given any other claim for service connection.

The Guide closes by encouraging adjudicators to flag close cases rather than deny them outright. Its final sentence reads: "There should be no hesitancy in submitting cases, appearing to have merit, but not meeting current criteria for service connection, to the Compensation and Pension Service for advisory opinion."

If this case turned only on the language of the Program Guide and its context (appearing as the two-hundred and fifty-ninth insert to a "non-directive and non-policymaking" manual), the result here would be indisputable. On its face, the Program Guide does not establish a binding, automatic rule of decision. *Compare Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) ("[T]he entire Guidance, from

beginning to end . . . reads like a ukase. It commands, it requires, it orders, it dictates.").

The language of the Program Guide does not end the inquiry, however, because "an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *General Electric Co. v. EPA,* 290 F.3d 377, 383 (D.C. Cir. 2002) (internal citation omitted); *see also Bowen,* 834 F.2d at 1057 n.4 (an agency pronouncement "initially classed as a general statement [of policy] is not immunized from subsequent judicial review for conformity with the APA if later developments show the agency to be using it as binding policy"); *Cmty. Nutrition,* 818 F.2d at 949 (notice-and-comment required because the FDA, "by virtue of its own course of conduct", gave action levels a "present, binding effect"). The passage of time in this case has allowed for the development of a record that raises serious questions about the practical effect that the AOPG had on actual adjudications.

Plaintiffs' position, that the AOPG was void from its inception because of the VA's failure to publish it in the Federal Register and to utilize notice and comment procedures, relies heavily on what they characterize as one-hundred percent conformance to the "rule of the Program Guide." *See* Dkt. 52 at 3 ("This perfect application of the Program Guide is crucial evidence that the Program Guide is a substantive rule[.]"). Uniformity of outcome alone, however, does not show that the AOPG was applied as binding. Both sides have submitted a number of decisions by the Board of Veterans Appeals. [Dkt. 45, Dkt. 46, Dkt. 52]. These decisions do not prove that the Board was effectively precluded from finding that

a disease other than chloracne was caused by Agent Orange. The decisions generally follow a similar format: in separate sections, the Board lists the claimant's contentions (e.g., the condition(s) for which he seeks benefits), the evidence presented by the claimant, and the applicable "law and regulations." *See* Dkt. 52, Ex. D, E, & F. But plaintiffs have not submitted a single decision in which the Board cites or directly refers to the AOPG.[4]

According to the plaintiffs, the binding effect of the Program Guide is demonstrated by the presence of the following language, which they assert is found in the discussion and evaluation section of a large percentage of the decisions that denied service connection:

> [T]he Veterans Administration, on its own, as well as by coordinated efforts with other governmental agencies, . . . is undertaking intensive study and review regarding possible health-related effects of reputed exposure to chemical defoliants, including Agent Orange. To date, there is no evidence to link any of the veteran's claimed disorders with reputed exposure to Agent Orange. Presently, the only known organic disease entity associated with exposure to chemical defoliants is chloracne . . . However, the veteran's complaints and history of exposure to chemical defoliants have been entered into the Agent Orange Registry Data Base. His interests are, therefore, noted and protected, vis-à-vis Agent Orange allegations; and, should studies

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[4] Plaintiffs did submit an affidavit stating that in a review of 665 decisions, the Program Guide was referenced by name in 13 of them, *see Pls.' Mot. for Sum. Jgmt.*, Ex. A, but the full context is unknown.

> conducted by the Veterans Administration or interagency studies conducted outside of the Veterans Administration establish a link between exposure to chemical defoliants and disabilities in the nature of those claimed by the veteran, his claim may be reopened and reevaluated at such future time.

[Dkt. 52, Ex. A at ¶ 12]. Without a doubt, some of this language-"presently, the only known organic disease entity associated with exposure to chemical defoliants is chloracne"-echoes the sentence that plaintiffs focus on in the Program Guide. However, that adjudicators ultimately adopted the position laid out in AOPG does not prove that they were required to do so, regardless of the evidence presented in the case at hand. Plaintiffs do not argue that there are specific decisions in which the claimant presented medical and scientific evidence sufficient to make out direct service connection, only to have that evidence rejected because of the "rule" set out in the Program Guide. Such decisions, had they been put forward, would tend to show that agency adjudicators lacked the ability to exercise their informed discretion. Absent such a showing, there is insufficient basis on which to find that the Program Guide announced a binding rule of decision.

Nor is binding application of the Program Guide by VA adjudicators the only possible explanation for veterans' complete lack of success on Agent Orange claims for diseases other than chloracne from 1979 to 1985. When the AOPG was in effect, veterans making Agent Orange claims could only receive benefits under direct service connection principles, which require a claimant to "establish[ ] direct actual causation." *Combee v. Brown*, 34 F.3d 1039, 1044 (Fed.

Cir. 1994). In cases of disability from a chronic disease manifested years after the claimant's active service, "[a]ctual causation carries a very difficult burden of proof." *Id.* at 1042. For Agent Orange claims, that difficulty was compounded by what Congress recognized in 1984 as the "scientific and medical uncertainty" regarding the long-term health effects of dioxin exposure. 38 U.S.C. § 354(2) (1984). That uncertainty, and the resulting difficulty of establishing actual causation for diseases other than chloracne, was what motivated passage of the Dioxin Act in 1984. *See* 130 Cong. Rec. 13154-55 (1984) (statement of Sen. Specter) ("The Federal Government has imposed an impossible burden of proof on . . . Vietnam Veterans to establish service connection for their injuries."); 130 Cong. Rec. at 13169 (statement of Sen. Byrd) ("[The Dioxin Act] simply corrects what I understand have been on occasion overly onerous burdens of proof."). The 1984 Act required the VA to conduct a rulemaking to determine which diseases should *thereafter* be regarded as presumptively service connected on the basis of a significant statistical correlation. 38 U.S.C. § 354(5) (1984); *Nehmer*, 712 F.Supp. at 1418. Today, after enactment of the Dioxin Act and subsequent regulations, a veteran may establish that his disability is service-connected to Agent Orange exposure either directly or presumptively. At the time that the AOPG was in effect, the only route open to veterans was direct service connection.

Conclusion

The plaintiffs have not shown that the denial of Agent Orange disability claims for diseases other than chloracne resulted from the constraining effect of the Agent Orange Program Guide itself, rather

than from the onerous burden of proof that they bore under direct service connection principles. Although the problem took years to be addressed and righted, Congress, the courts, and the VA itself gradually cleared the way for veterans affected by Agent Orange exposure to receive benefits under the far more permissive route of presumptive service connection. Veterans whose claims were denied while the AOPG was in effect have been free to refile their claims, and to receive forward-looking compensation under liberalizing regulations promulgated since then. 38 U.S.C. § 5110(g); 38 C.F.R. § 3.400. In sum, the statutory and regulatory framework for Agent Orange-related disability claims has evolved and improved considerably from the time that this case was filed. The Court is unable to grant plaintiffs further relief pursuant to either the APA or to FOIA.

An appropriate order accompanies this memorandum.

ORDER

For the reasons set forth in the accompanying memorandum, plaintiffs' motions for summary judgment [Dkt. 13] and class certification [Dkt. 8] are denied. Defendant's motion for judgment on the pleadings, [Dkt. 16], treated as a motion for summary judgment in accordance with Fed. R. Civ. P. 12(d), is granted.

APPENDIX E

UNITED STATES PUBLIC LAWS
100th Congress - Second Session
Convening January 25, 1988

PL 100-687 (S 11)
November 18, 1988

An Act to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rule-making procedures of the Veterans' Administration; to establish a Court of Veterans' Appeals and to provide for judicial review of certain final decisions of the Board of Veterans' Appeals; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; to increase the rates of compensation payable to veterans with service-connected disabilities; and to make various improvements in veterans' health, rehabilitation, and memorial affairs programs; and for other purposes.

Be it enacted by the Senate and
House of Representatives of the United States
of America in Congress assembled,

DIVISION A VETERANS' JUDICIAL REVIEW

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) SHORT TITLE.—This division may be cited as the "Veterans' Judicial Review Act" "38 USC 101 note".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATIVE AND RULEMAKING AUTHORITY OF THE VETERANS' ADMINISTRATION

SEC. 101. DECISIONS BY ADMINISTRATOR.

(a) MATTERS TO BE DECIDED BY ADMINISTRATOR.—Subsection (a) of section 211 is amended to read as follows:

"(a)(1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

"(2) The second sentence of paragraph (1) of this subsection does not apply to—

"(A) matters subject to section 223 of this title;

"(B) matters covered by sections 775 and 784 of this title;

"(C) matters arising under chapter 37 of this title; and

"(D) matters covered by chapter 72 of this title.".

(b) CONFORMING AMENDMENT.—Section 4004(a) is amended by striking out "All questions on claims involving benefits under laws administered by the Veterans' Administration" and inserting in lieu thereof "All questions in a matter which under section 211(a) of this title is subject to decision by the Administrator".

SEC. 102. VETERANS' ADMINISTRATION RULEMAKING.

(a) APA PROCEDURES.—(1) Chapter 3 is amended by inserting after section 222 the following new section:

"Section 223. Rulemaking: procedures and judicial review

"(a) In applying section 552(a)(1) of title 5 to the Veterans' Administration, the Administrator shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.

"(b) The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Administrator.

"(c) An action of the Administrator to which section 552(a)(1) or 553 of title 5 (or both) refers (other than an action relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 355 of this title) is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for

the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 222 the following new item:

"223. Rulemaking: procedures and judicial review.".

(b) REPORT ON IMPLEMENTATION.—Not later than May 1, 1989, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the implementation of section 223(a) of title 38, United States Code, as added by subsection (a)(1). Such report shall set forth the actions the Administrator is taking to ensure that such section is carried out.

* * *

TITLE IV—EFFECTIVE DATES AND APPLICABILITY

SEC. 401. "38 USC 4051 note" EFFECTIVE DATES.

(a) GENERAL EFFECTIVE DATE.—Except as otherwise provided in this section, this division (and the amendments made by this Act) shall take effect on September 1, 1989.

(b) EFFECTIVE DATE FOR CERTAIN TRANSITION PROVISIONS.—The amendment made by section 201(a) shall take effect on February 1, 1989.

(c) DATE OF ENACTMENT.—Sections 201 (other than subsection a)), 208, 209, 302, and 303, and the

amendments made by those sections, shall take effect on the date of the enactment of this Act.

(d) BOARD OF VETERANS' APPEALS.—Sections 202 through 207 shall take effect on January 1, 1989.

(e) COMMENCEMENT OF OPERATION OF COURT OF VETERANS APPEALS.—Notwithstanding subsection (a), the United States Court of Veterans Appeals established pursuant to chapter 72 of title 38, United States Code (as added by section 301) shall not begin to operate until at least three judges have been appointed to the court.

SEC. 402. "38 USC 4051 note" APPLICABILITY TO CASES AFTER DATE OF ENACTMENT.

Chapter 72 of title 38, United States Code, as added by section 301, shall apply with respect to any case in which a notice of disagreement is filed under section 4005 of title 38, United States Code, on or after the date of the enactment of this Act.

* * *

APPENDIX F

UNITED STATES CODE ANNOTATED
Effective: October 10, 2008

Title 38. Veterans' Benefits
Part I. General Provisions
Chapter 5. Authority and Duties of the Secretary
Subchapter I. General Authorities

§ 502. Judicial review of rules and regulations

An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

CREDIT(S)

(Added Pub.L. 102-83, § 2(a), Aug. 6, 1991, 105 Stat. 386, amended Pub.L. 110-389, Title I, § 102, Oct. 10, 2008, 122 Stat. 4148.)

APPENDIX G

UNITED STATES CODE ANNOTATED
Effective: [See Text Amendments]

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 99. General Provisions

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

CREDIT(S)

(Added Pub.L. 97-164, Title III, § 301(a), Apr. 2, 1982, 96 Stat. 55.)